Filed 2/7/20 P. v. Villareal CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL VILLAREAL, Defendant and Appellant.	B291257 (Los Angeles County Super. Ct. No. BA444273)

APPEAL from an order/a judgment of the Superior Court of Los Angeles County, Leslie Swain, Judge. Reversed in part, conditionally reversed in part, and remanded with directions.

Cynthia Grimm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jose Manuel Villareal of attempted murder (count 1), in violation of Penal Code sections 187, subdivision (a), and 664;[1] and assault with a firearm (count 2), in violation of section 245, subdivision (a)(2). On both counts, the jury found true an allegation Villareal committed the crimes for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) With respect to count 1, the jury found that a principal personally and intentionally discharged a firearm, proximately causing great bodily injury. (§ 12022.53, subds. (d) & (e)(1).)

The trial court sentenced Villareal to an aggregate sentence of 15 years, consisting of the low term of five years for attempted murder, plus 10 years for the gang enhancement. The court struck the firearm enhancement for purposes of sentencing. The court also imposed the low term of two years on count 2 but stayed the sentence pursuant to section 654.

Villareal contends that his convictions must be reversed on several grounds: (1) The trial court violated his rights to due process and a speedy trial by allowing his case to proceed after the prosecution had voluntarily dismissed the case twice before; (2) There was insufficient evidence to support the convictions; (3) The attempted murder conviction was based on a theory of natural and probable consequences, which he alleges is no longer viable following the enactment of Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015); (4) The court violated his right to due process by denying his motion for a new trial; (5) The court's instructions regarding

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

the gang enhancement were erroneous; (6) The court allowed the prosecution to present an invalid theory of aiding and abetting liability; (7) The court failed to instruct the jury on the lesser included offense of attempted voluntary manslaughter; (8) The prosecutor committed misconduct by misstating the law and evidence and vouching; and (9) His trial counsel was ineffective in several respects. Villareal also contends that even if individual errors were harmless, the cumulative effect of the errors prejudiced him.

We reverse Villareal's conviction of assault with a firearm on the ground that section 1387 barred the prosecution from prosecuting the case against him after two voluntary dismissals. We also remand the case to the trial court for a determination of whether the prosecution for attempted murder was permissible, under the doctrine of excusable neglect, despite two previous dismissals. (§ 1387.1, subd. (a).) We reject all of appellant's other contentions.

FACTS AND PROCEEDINGS BELOW

At around 3:30 a.m. on January 25, 2016, a man named Johnny Aguilar saw two men standing next to his brother's car. It was dark outside, and one of the men stood by the driver's side with a skeleton mask partially obscuring his face. The man in the mask tried to open the driver's side door of the car. Aguilar said it was his brother's car and asked the men what they were doing. The man on the driver's side pulled out a gun, and Aguilar said, "[I]f you're going to shoot, you better shoot." The man then shot him two or three times. The shots hit Aguilar in one of his testicles and his leg. He went to the hospital, where doctors removed the injured testicle.

Aguilar told police that he recognized the man who shot him as someone named Pelon. He later identified the man in a photo lineup as Tommy Reyes. Aguilar knew the other man, who was standing by the passenger side of the car, as Little Tweety. Aguilar later identified a photo of Villareal from a lineup as Little Tweety. Aguilar told police that he knew the two men because they had tried to break into his home a few months earlier. At trial, however, Aguilar denied that he could identify Reyes as the shooter or Villareal as the other man who had been present. He also testified that he did not remember telling the police that he knew who shot him.

Aguilar testified that the man at the passenger side of the car just stood there and that he did not see him do anything. Similarly, in an interview with police shortly after the shooting, Aguilar said that Villareal "was just following" Reyes and did not say or do anything. He stood on the sidewalk and did not try to get in the car.

The prosecution played for the jury a recording of a jailhouse telephone conversation between Villareal and a friend. In that conversation, Villareal told the friend that he told police he did not know "Tommy," presumably referring to his codefendant Reyes. Villareal also said, apparently in reference to Aguilar, "they gave that dude some photos of ours, of the entire neighborhood, and [told] him to point out the faces that did it." Villareal then encouraged his friend to intimidate Aguilar about giving information to police in the case. He told his friend to "tell . . . that dude to not, you know—to not point at my face, dude, because if not, it's going to go . . . fucking bad for him." "[T]ell that dude to remove my fucking face from there, dude."

The friend told Villareal that he was going to "go do that shit right now."

The parties stipulated that Villareal was a member of the Loco Park gang, and that his codefendant Reyes was a member of the Burlington Loco gang. A police gang expert testified that the two gangs are allies, and that a hypothetical shooting of the kind that occurred here would have been for the benefit of a street gang.

DISCUSSION

A. *Prosecution After Two Voluntary Dismissals*

Villareal contends that the trial court erred by allowing the prosecution to refile and prosecute the case against him after dismissing the case twice. Section 1387 provides that "[a]n order terminating an action . . . is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated." (§ 1387, subd. (a).) In other words, if the prosecution twice dismisses a case against a defendant, it may not proceed with charges against the defendant for the same offense for a third time. (*People v. Juarez* (2016) 62 Cal.4th 1164, 1167 (*Juarez*).) An exception to this rule exists for violent felonies: in such cases, even though "the prosecution has had two prior dismissals, as defined in [s]ection 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under [s]ection 1387 were due solely to excusable neglect." (§ 1387.1, subd. (a).)

Villareal and the Attorney General agree, and the record shows, that the case was dismissed twice before it was refiled again and brought to trial. We must therefore reverse Villareal's

conviction in count 2 for assault with a firearm, which is not classified as a violent felony, at least as applied to a defendant who did not fire the weapon. (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 856 (*Sinclair*); see § 667.5, subd. (c).) With respect to the conviction for attempted murder in count 1, which is a violent felony (see § 667.5, subd. (c)(12)), we agree with the Attorney General that the appropriate remedy is to remand the case to the trial court to make a factual finding regarding whether one of the prior dismissals was due solely to excusable neglect.

The district attorney first filed an information charging Villareal with one count of attempted murder and one count of assault with a deadly weapon on August 3, 2016. Villareal waived the requirement that the case be brought to trial within 60 days (see § 1382, subd. (a)(2)), and the case was set for trial on November 28, 2016. On November 28, 2016 the prosecutor told the court that he was unable to proceed with the case at that time. Both parties agreed to dismiss the case and deem it to be refiled under the existing information pursuant to section 1387.2, with a new deadline to begin trial of January 27, 2017.

On January 10, 2017, the trial court granted the prosecution's motion to consolidate Villareal's case with that of his codefendant, Reyes, under a new information.[2]

---

[2] The filing of the consolidated information rendered the previous information redundant. Villareal argues that this should be deemed a dismissal of the previous information for purposes of section 1387. We disagree. "In general, courts have *not* considered dismissals of duplicative accusatory pleadings to be terminations of actions within the scope of section 1387." (*Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 220.)

On June 12, 2017, the parties informed the trial court that they again wished to dismiss the case and proceed on the same pleading pursuant to section 1387.2. Villareal's attorney told the trial court that his case had already been dismissed and refiled once before. In order to dismiss it and allow it to be refiled once again, the attorney told the court that it would need to make a finding of excusable neglect. The court disagreed and found that the case had not previously been dismissed, and that it was therefore not necessary to make a finding of excusable neglect. The court then dismissed the case pursuant to section 1387.2 and rearraigned Villareal, now for the third time.

Both parties agree, as do we, that all the charging documents in this case were for "the same offense[s]," as is required to bar further prosecution under section 1387. The sole meaningful difference in any of the charging documents is that the consolidated information alleged that Villareal committed assault with a firearm on January 25, 2016, whereas the original information alleged that offense occurred on October 31, 2015. But that change appears to have been the correction of a clerical error. It is likewise clear that the prosecution twice dismissed the charges against Villareal. On two occasions, the parties agreed to act pursuant to section 1387.2, which allows a case to proceed under an existing information in lieu of dismissing it. That section explicitly states that "[f]or the purposes of

---

This is because the dismissal of a duplicative pleading "involving the same facts does not involve the defendant in the kind of successive prosecutions that section 1387 was designed to prevent." (*People v. Cossio* (1977) 76 Cal.App.3d 369, 372.)

[s]ection 1387, the action shall be deemed as having been previously terminated." (§ 1387.2) Nor did Villareal invite the error or forfeit the objection. His trial attorney called the issue to the attention of the trial court and stated that she objected to allowing the case to move forward having been twice dismissed.

Thus, the only question is the proper remedy for the error. Villareal argues that the proper remedy is to reverse his conviction. We disagree. If the trial court had found, at the time it dismissed the second case and allowed the third case to be refiled, that one of the dismissals was "due solely to excusable neglect" (§ 1387.1, subd. (a)), the prosecution could have proceeded with the refiled attempted murder charge against Villareal despite the two dismissals. As the Attorney General suggests, the court's failure to make a finding regarding excusable neglect may be remedied by remanding the question to the trial court. We have the authority under section 1260 not merely to "reverse, affirm, or modify a judgment or order appealed from," or to "order a new trial," but also to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260.) Our Supreme Court has held that we may use this authority in appropriate circumstances to allow the trial court to make certain factual findings even after trial. " '[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.' [(*People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405 (*Vanbuskirk*).] In other words, 'when the trial is free of prejudicial error and the appeal prevails on a challenge which

establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made.' " (*People v. Moore* (2006) 39 Cal.4th 168, 176–177 (*Moore*).)

Thus, in *Moore*, where the trial court denied the defendant's suppression motion on an erroneous ground, and the defendant was subsequently convicted, the Court remanded the case to the trial court to hold a new suppression hearing to reconsider the suppression motion on alternative grounds. (*Moore*, *supra*, 39 Cal.4th at p. 176.) Similarly, in *Vanbuskirk*, the trial court erred by refusing to consider the defendant's motion to exclude a witness's identification of the defendant on the ground that it was tainted by an improper photo identification. (*Vanbuskirk*, *supra*, 61 Cal.App.3d at p. 401.) The court remanded the case to the trial court to determine whether the identification process was unfair, and depending on the outcome, either pronounce judgment or grant a new trial. (*Id.* at p. 407.) In *People v. MacDonald* (1972) 27 Cal.App.3d 508, 511–512, the court remanded the case to the trial court to determine whether the defendant's constitutional right to a speedy trial had been violated.

We see no reason the same remedy is not appropriate in this case. The question regarding the reasons for the prior dismissals of Villareal's case is "distinct from issues the jury must consider" (*Moore*, *supra*, 39 Cal.4th at p. 177), and if resolved against Villareal would not call into question the validity of the trial or the jury's verdict in any way.

Villareal objects, noting that when the Supreme Court in *Juarez*, *supra*, 62 Cal.4th 1164 held that the trial court improperly allowed a defendant's prosecution to continue in spite of two prior dismissals, it did not remand the case to the trial court to determine whether one of the prior dismissals was due to excusable neglect. Instead, it simply reversed the defendant's conviction. (*Id.* at p. 1175.) Villareal contends that we are bound to do the same. We disagree. "Cases are not authority for matters not considered." (*People v. Stone* (2009) 46 Cal.4th 131, 140.) There is no indication in *Juarez* that any party raised the possibility of remanding the case for a determination of whether one of the dismissals was for excusable neglect, nor that the Court considered the possibility.

Villareal also argues that he is disadvantaged because by the time the trial court decides this question, several years will have passed since the prior dismissals, which took place in 2016 and 2017. We disagree. As the Court explained in *Moore*, *supra*, 39 Cal.4th at pages 177–178, " '[w]e are not persuaded that relitigation should have been denied because of delay. Delays that are the product of the normal appellate process do not implicate due process concerns.' " In *Moore*, the court remanded to allow the parties to relitigate a suppression motion in which the defendant bore the burden of proof. In this case, it is the prosecution's burden to show that one of the prior dismissals was the result of excusable neglect. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747 ["since the prosecution is procedurally barred from proceeding with a third prosecution except in limited circumstances, it should bear the burden of establishing the existence of those circumstances"].) Thus, to the extent the prosecution is unable to recall or produce evidence regarding the

circumstances of the prior dismissals, that is to Villareal's benefit.

Section 1387.1 allows a case to be refiled after two prior dismissals in cases of excusable neglect only in cases alleging violent felonies. Attempted murder is a violent felony under section 667.5, subdivision (c), but assault with a firearm is not.[3] (See § 667.5, subd. (c)(12); *Sinclair*, *supra*, 166 Cal.App.4th at p. 856.) Thus, upon remand, the trial court must make a finding regarding whether one of the dismissals was due solely to excusable neglect only as to count 1 for attempted murder. Count 2 for assault with a firearm must be dismissed regardless.

B. *Substantial Evidence of Attempted Murder*

Villareal contends that there was no substantial evidence to support his conviction of attempted murder in two respects: He argues that the evidence was insufficient to show that he was the person at the scene, or that, if he was the person on the scene, he was liable for the shooting. We disagree.

In reviewing sufficiency of the evidence, we ask "whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. . . . [W]e must view the evidence in the light most favorable to the People and must

---

[3] Section 667.5, subdivision (c)(8) defines as a violent felony "[a]ny felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section[s] 12022.5 or 12022.55," but Villareal did not use a firearm, nor did the prosecution charge and prove a firearm enhancement with respect to count 2. The Attorney General offers no argument that assault with a firearm is a violent felony under any other part of section 667.5, subdivision (c).

presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for ' "substantial evidence—that is, evidence which is reasonable, credible, and of solid value" ' that would support a finding beyond a reasonable doubt. (*People v. Boyce* (2014) 59 Cal.4th 672, 691 . . . .)" (*People v. Banks* (2015) 61 Cal.4th 788, 804.)

Villareal contends that there was insufficient evidence to establish his identity at the scene. He argues that statements to police by the victim, who was the sole eyewitness, are insufficient because the victim recanted when testifying at trial. At trial, the victim claimed he could not identify the man who stood at the passenger side door, and said he did not remember identifying Villareal from a photo lineup.

A witness's out of court statements can serve as evidence to convict a defendant even if the witness later recants. (*People v. Cuevas* (1995) 12 Cal.4th 252, 276–277.) Indeed, initial out-of-court statements may be more reliable than later recantations, especially where the witness offers no explanation for why his statements regarding past events changed, and where there is evidence that the witness changed his statements as a result of fear or intimidation. (*Id.* at p. 268.)

In this case, the victim offered no plausible explanation for why he changed his testimony. One possible explanation is that he was the victim of an intimidation campaign instigated at least in part by Villareal. In a recorded jailhouse phone call, Villareal discussed the case with a friend and appeared particularly concerned that a witness had identified Villareal from a photo

lineup. Villareal told his friend to tell "that dude to not, you know—to not point at my face, dude, because if not, it's going to go—" "–fucking bad for him." "[T]ell that dude to remove my fucking face from there, dude." The potential for witness intimidation is one of the reasons "we routinely view recantations with suspicion." (*In re Hall* (1981) 30 Cal.3d 408, 418.)

Villareal also argues the identification was not credible because the witness had a criminal record and might have been biased against Villareal. He notes that the circumstances of the identification were not ideal because it was dark outside and that the victim may have been traumatized by having been shot. In making these arguments, Villareal asks us in essence to reweigh the evidence. That is not our function. "[T]he credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.) The jury could reasonably conclude that the victim's identification was accurate. Villareal was not a stranger to the victim. They had interacted before and knew each other from the neighborhood. In addition, Villareal had a motive to steal the victim's brother's car because he was angry that the victim had thwarted his earlier attempt to break into the victim's home. Villareal also displayed a consciousness of guilt in asking his friend to intimidate the victim to prevent him from testifying. A jury could reasonably conclude that the victim's original identification of Villareal was accurate, and that he recanted that statement as a result of Villareal's intimidation.

Villareal also contends that even if he was present at the scene, there was insufficient evidence to show that he was guilty of attempted murder, either under a theory of direct aiding and

abetting, or natural and probable consequences. We need not decide whether there was sufficient evidence to convict Villareal on a theory of direct aiding and abetting because there was sufficient evidence on a natural and probable consequences theory.

To be guilty of aiding and abetting a crime, a person must "act[ ] 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161 (*Chiu*).) An aider and abettor's criminal liability is not limited to the crime he directly assisted the perpetrator to commit, however. In addition, the aider and abettor is also guilty " ' "of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." '. . . [¶] A nontarget offense is a ' "natural and probable consequence" ' of the target offense if, judged objectively, the additional offense was reasonably foreseeable." (*Ibid.*)

In this case, there was sufficient evidence for a reasonable jury to conclude that Villareal aided and abetted Reyes in committing an attempted burglary, and that the attempted murder of Aguilar was a natural and probable consequence of the attempted burglary. Villareal argues there was insufficient evidence of attempted burglary because the prosecution presented no evidence that the car doors were locked and the windows were shut. (See § 459 [defining burglary in part as entry into a "vehicle . . . when the doors are locked . . . with intent to commit grand or petit larceny or any felony"].) We disagree. Aguilar testified that just prior to the shooting, he saw Reyes "[t]ry to open the door" of the car. A jury could reasonably infer

from the fact that Reyes was apparently unable to open the door and was not reaching through the windows that the car's doors were locked and the windows rolled up. Furthermore, a jury could reasonably conclude that the attempted murder was a natural and probable consequence of the burglary. " ' "[A] natural and probable consequence is a foreseeable consequence . . . ." ' [Citation.] But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough." ' " (*People v. Medina* (2009) 46 Cal.4th 913, 920.) A reasonable person in Villareal's circumstances could have foreseen that someone might confront him and Reyes during the burglary, and that Reyes might attempt to kill that person by firing a gun at him. (See *id.* at pp. 921–922 [prior knowledge that codefendant was armed is not necessary to conclude that shooting was a natural and probable consequence of a crime].)

C. *The Application of Senate Bill No. 1437 to Attempted Murder*

In *Chiu*, the Supreme Court held that a defendant could not be convicted of first degree murder on the basis of the natural and probable consequences doctrine, reasoning that the mental state required for first degree murder, including "elements of willfulness, premeditation, and deliberation" are "uniquely subjective and personal." (*Chiu, supra,* 59 Cal.4th at p. 166.) A defendant could not be guilty of first degree murder unless he actually displayed that mental state. (*Ibid.*) The Court in *Chiu* held that defendants could still be guilty of second degree murder on a natural and probable consequences theory, however. (*Ibid.*)

In 2018, the Legislature enacted Senate Bill No. 1437, which moved beyond *Chiu* and eliminated the natural and

probable consequences doctrine as a theory of guilt for second degree murder. (See Senate Bill No. 1437 (2017–2018 Reg. Sess.) § 2 [amending section 188].) Under the new law, "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3), as amended by Senate Bill No. 1437 (2017–2018 Reg. Sess.) § 2.)[4] The bill also created a procedure by which a defendant convicted of murder under a natural and probable consequences theory may petition for relief in the trial court. (See Senate Bill No. 1437 (2017–2018 Reg. Sess.) § 4 [enacting section 1170.95].) Villareal contends that Senate Bill No. 1437 also abolishes the natural and probable consequences doctrine in cases of attempted murder, and that the law applies retroactively to him so that he may raise the issue on direct appeal and need not petition for relief under section 1170.95. We disagree.

Villareal contends that he may raise arguments based on Senate Bill No. 1437 on direct appeal, and need not file a petition under section 1170.95 in the trial court. "When an amendatory statute . . . lessens the punishment for a crime . . . , it is

---

[4] The only exception is in cases of felony murder, in which a defendant who participated in one of certain enumerated felonies that resulted in the death of a victim may still be guilty of murder even if he did not act with malice aforethought. (See §§ 188, subd. (a)(3), 189, subds. (a) & (e).) Even in those cases, however, under Senate Bill No. 1437, a defendant is not guilty of murder merely by participating in a felony; instead, he must have either acted with reckless indifference to human life or personally solicited or participated in the killing. (See § 189, subd. (e), as amended by Senate Bill No. 1437 (2017–2018) § 3.)

reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) Because Villareal's conviction was not yet final when Senate Bill No. 1437 became effective on January 1, 2019, he argues that he is eligible for relief on direct appeal.

The Attorney General argues that Villareal may not obtain relief on direct appeal because the Legislature, in enacting section 1170.95, intended for that section to provide the exclusive mechanism for retroactive relief under the law. In *People v. Martinez* (2019) 31 Cal.App.5th 719, our colleagues in Division 5 agreed with this position: "That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill [No.] 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Id.* at p. 727; accord, *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1113 (*Lopez*), review granted Nov. 13, 2019, S258175; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1152–1153.)

We need not decide whether section 1170.95 is the exclusive method for obtaining retroactive relief because even if Villareal were entitled to seek relief on direct appeal, his claim would fail on the merits. Senate Bill No. 1437 unambiguously repeals the natural and probable consequences doctrine with respect to murder, but not attempted murder. As the court explained in *Lopez*, *supra*, 38 Cal.App.5th 1087, the language of Senate Bill No. 1437 refers only to murder, not attempted

murder. Furthermore, the text "expressly identifies its purpose as the need 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Had the Legislature meant to bar convictions for attempted murder under the natural and probable consequences doctrine, it could . . . have done so." (*Lopez*, *supra*, at p. 1104.) Its failure to refer to attempted murder in the legislation reflects a decision not to alter the natural and probable consequences doctrine in cases of attempted murder. (*Ibid.*; accord, *People v. Munoz* (2019) 39 Cal.App.5th 738, 753–760, review granted Nov. 26, 2019, S258234.)

Villareal contends that this conclusion is contrary to the language of the newly amended section 188, which provides that except in cases of felony murder, "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) In cases of direct liability, attempted murder requires an even stricter mental state than murder. Whereas a defendant may be guilty of murder simply by acting with conscious disregard for human life (*People v. Bland* (2002) 28 Cal.4th 313, 327), attempted murder requires the specific intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) If malice aforethought is now required for any murder

conviction, Villareal argues that the same should be true for attempted murder.[5]

We are not persuaded. As the court explained in *Lopez*, the natural and probable consequences doctrine "imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. It is not an implied malice theory; the mens rea of the aider and abettor with respect to the nontarget offense, actual or imputed, is irrelevant. (*Chiu*, *supra*, 59 Cal.4th at p. 164.) Rather, liability is imposed because a reasonable person could have foreseen the commission of the additional offense." (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1102–1103, fn. omitted.) The malice requirement imposed by Senate Bill No. 1437 applies only to murder, not attempted murder. A defendant may be guilty of attempted murder under a natural and probable consequences theory even if he did not personally act with malice. (*Lopez*, *supra*, at p. 1106.)

Nor do we agree with Villareal's contention that the application of the natural and probable consequences doctrine to attempted murder violates his constitutional right to equal protection under the law. " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.'

---

[5] In two recent cases, the Fifth Appellate District agreed with Villareal's position and disagreed with *Lopez*. (See *People v. Larios* (2019) 42 Cal.App.5th 956, 964–968, petn. for review pending; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1012–1016, petn. for review pending.) We disagree with the reasoning of these two cases and agree with *Lopez*.

[Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "If the two groups are not similarly situated or are not being treated differently, then there can be no equal protection violation." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1108.)

Villareal's contention fails because "those charged with, or found guilty of, murder are, by definition, not similarly situated with individuals who face other, less serious charges." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1109.) And although they are closely related, "[m]urder and attempted murder are separate crimes." (*Ibid.*, citing *People v. Marinelli* (2014) 225 Cal.App.4th 1, 5 ["[i]t is well established that ' "[a]n attempt is an offense 'separate' and 'distinct' from the completed crime" ' "].) The Legislature unequivocally singled out murder as the target of reform in Senate Bill No. 1437. The text of the bill states that its purpose was "to more equitably sentence offenders in accordance with their involvement in homicides." (Senate Bill No. 1437 (2017-2018 Reg. Sess.) § 1(b).) Murder requires a much greater sentence than attempted murder, with a term of 15 years to life for second degree murder (see § 190, subd. (a)), as opposed to a five-year minimum for attempted murder. (See § 664, subd. (a).) "The Legislature could have reasonably concluded reform in murder cases 'was more crucial or imperative' " (*Lopez*, *supra*, 38 Cal.App.5th at p. 1112) and limited the law to those cases in order to preserve the limited resources of the judicial system.

We are aware that our interpretation of Senate Bill No. 1437 leads to the strange consequence that a defendant who commits a crime in which a codefendant attacks a victim

may now receive a lesser sentence if the victim dies than if he survives. If Reyes had been a more accurate marksman, Villareal likely would have been convicted of murder, not attempted murder. If he could make the required showings, he could have obtained a reversal of his conviction under section 1170.95. Because Aguilar survived, Villareal was convicted of attempted murder and is not eligible for relief. In an earlier case, our Supreme Court warned against imposing greater punishment for attempted murder than for murder: A "[d]efendant should not be penalized because one of his victims survived; he should not be made to regret not applying the coup de grâce to that victim." (*People v. King* (1993) 5 Cal.4th 59, 69.)

But Senate Bill No. 1437 applies only to those who did not directly take part in a murder. If a defendant is in a position to decide whether or not to "apply[ ] the coup de grâce to [a] victim" (*People v. King*, *supra*, 5 Cal.4th at p. 69), he would be guilty as a perpetrator or direct aider and abettor, not under a natural and probable consequences theory. More importantly, any reasonable interpretation of Senate Bill No. 1437 requires us to conclude that the Legislature intended to provide relief to certain defendants convicted of murder, but not those convicted of what we ordinarily consider lesser offenses. Under any interpretation of Senate Bill No. 1437, the natural and probable consequences doctrine remains in effect for many offenses that carry lengthy prison sentences.

D. *Motion for New Trial*

After his conviction, Villareal filed a motion for a new trial on two grounds: that the jury's verdict was contrary to the evidence, and that he had obtained new material evidence. (See § 1181, subds. (6) & (8).) Villareal contends that the trial

court abused its discretion when it denied the motion. He argues that if the jury had heard expert testimony that he suffered from psychological problems including fetal alcohol spectrum disorder, it might not have convicted him of attempted murder. He also argues that the trial court applied an incorrect standard when considering his claim that the verdict was contrary to the evidence.

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Because we reject both grounds on which his motion was based, we conclude that the trial court did not abuse its discretion by denying Villareal's motion.

1. *Newly discovered evidence*

In preparation for a youthful offender parole hearing (see § 3051) following Villareal's conviction, two psychologists examined Villareal and concluded that he was suffering from a number of psychological ailments, most notably fetal drug and alcohol syndrome. In his motion for a new trial, Villareal argued that the psychologists' reports constituted newly discovered evidence that called his conviction into question. He argued that if the psychologists had been able to offer expert testimony regarding his conditions, he might have been able to convince the jury that he was incapable of forming the specific intent required to assist Reyes in committing the attempted burglary, and that he could not have foreseen that the shooting was a natural and probable consequence of the attempted burglary. As part of

the motion for a new trial, one of the psychologists filed a report in which he stated that because of the fetal drug and alcohol syndrome, Villareal "would have little ability to analyze in any thoughtful way, let alone be aware of and appreciate, the grave consequences of participation with his co-defendant." The trial court denied the motion, concluding that even assuming the psychologists' reports constituted newly discovered evidence that could not have been produced at trial, Villareal had failed to demonstrate a probability that its inclusion would have produced a better result for him at trial.

A trial court may grant a defendant's motion for a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. (8).) " 'In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: " '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' " ' " (*People v. Howard* (2010) 51 Cal.4th 15, 43.)

The trial court denied Villareal's motion because it concluded that he failed to meet the third factor listed above, to demonstrate that a different result would be probable on a retrial. Villareal argues that this was an abuse of discretion. He argues that the psychologists' testimony would have been useful in calling into question his mental state at the time of the crime. The trial court considered this argument carefully,

and its conclusion rejecting Villareal's argument was reasonable. The jury heard excerpts of Villareal's jailhouse phone calls, in which he encouraged a friend to try to intimidate Aguilar to prevent him from testifying at trial. Expert testimony of Villareal's inability to plan ahead and foresee the consequences of his actions would be unlikely to persuade a jury that had already listened to him engaging in just that kind of behavior. Further, to the extent the evidence would have been proferred to show Villareal's inability to anticipate the attempted murder, it is irrelevant because the natural and probable consequences doctrine is not subjective but objective. (See *Chiu*, *supra*, 59 Cal.4th at p. 164 [" 'culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime' "].) Thus, Villareal's actual state of mind would not be relevant.

2. *Contrary to law or evidence*

In his motion for a new trial, Villareal also argued for relief on a second ground—that the verdict was contrary to law or evidence. (§ 1181, subd. (6).) In the hearing on the motion, the trial court did not address Villareal's argument on this ground. After discussing why it was not convinced that Villareal was entitled to a new trial on the basis of newly discovered evidence, the court simply stated, "[t]he new trial motion is respectfully denied." Villareal argues that we should infer from this lack of discussion that the trial court either failed to make a decision on his second argument, or that the court applied an incorrect standard. We are not persuaded.

Villareal's only basis for claiming that the trial court applied an erroneous standard is a comment the prosecutor made during the hearing on the motion. The prosecutor stated

that Villareal's argument "sounds more like [a section] 1118 argument." Villareal is correct that the standard for deciding a motion for a new trial under section 1181, subdivision (6) is different from the standard for entering a judgment of acquittal for insufficient evidence under section 1118.1.[6] In a motion under section 1118.1, " ' "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132.) By contrast, "[t]he court extends no evidentiary deference in ruling on a section 1181[, subdivision] (6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' " (*Id.* at p. 133.)

But we cannot conclude on the basis of a single stray comment from the prosecutor that the trial court applied the wrong standard. Nor may we infer from the trial court's silence on the question that the court simply neglected to decide whether Villareal was entitled to a new trial under section 1181, subdivision (6). Villareal cites no law requiring the trial court to provide an explanation with respect to every ground that a party raises in a motion for a new trial. We therefore apply the ordinary rule when the court does not explain its reasoning:

---

[6] In his comment, the prosecutor referred to section 1118. That section deals with judgments of acquittal in bench trials. Because Villareal was tried by jury, we infer that the prosecutor meant to refer to section 1118.1.

" 'In the absence of evidence to the contrary, we presume that the court "knows and applies the correct statutory and case law." ' " (*People v. Jones* (2017) 3 Cal.5th 583, 616.)

E. *Jury Instruction on Pattern of Gang Activity*

Villareal contends that the trial court erred by instructing the jury incorrectly regarding the gang enhancement on his attempted murder conviction. Villareal identifies two alleged errors in the instruction. First, the instruction did not state that the prosecution needed to prove at least two predicate offenses in order to show a pattern of gang activity. Second, the instruction stated that unlawful possession of a firearm was a predicate offense, even though not all offenses in that category are within the statutory definition. We conclude that any error in the instructions was harmless.

In order to prove a gang enhancement under section 186.22, the prosecution must show that the defendant acted for the benefit of a gang with knowledge that its members engage in a "pattern of criminal gang activity." (§ 186.22, subd. (a).) This term is in turn defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of *two or more* of" certain predicate offenses. (§ 186.22, subd. (e), italics added.) At a hearing prior to closing arguments, the trial court indicated to the parties that it planned to instruct the jury regarding the gang enhancement pursuant to the CALCRIM No. 1401 pattern instruction. That instruction mirrors the text of the statute in defining "pattern of criminal gang activity" to mean "two or more" predicate crimes, or "two or more occurrences of" the same predicate crime.

Reyes's counsel objected to this portion of the instruction, arguing that the language was unnecessary and potentially confusing because she conceded that her client's gang committed at least two predicate offenses among its primary activities. The court asked, "So can we all agree to take those paragraphs out then?" Villareal's trial counsel replied, "I do," and the court removed the language from the instruction. The trial court ultimately gave the jury the following instruction: " 'A pattern of criminal activity' as used here, means the commission of, attempted commission of, conspiracy to commit, or conviction of *at least one* of the following crimes: [¶] Murder, attempted murder, unlawful possession of a firearm, burglary, and shooting at an inhabited dwelling." (Italics added.)

The Attorney General argues that Villareal either invited the error or forfeited any objection to it. We disagree. The ordinary rule requiring a defendant to object in the trial court in order to preserve an error does not apply to an error where an instruction omits an element of an offense. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 538.) We may review instructional error "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) It is true that " 'The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a "conscious and deliberate tactical choice" to "request" the instruction' " (*People v. Weaver* (2001) 26 Cal.4th 876, 970), but in this case, it was Reyes, not Villareal, who requested the instruction. Villareal merely assented to the instruction with no indication of doing so for a deliberate tactical reason. This is insufficient to constitute

invited error by Villareal. (See *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1267–1268.)

Nevertheless, we reject Villareal's argument on the merits because any errors in the instructions were harmless. As the Attorney General points out, Reyes's trial counsel requested the removal of the language regarding "two or more" predicate crimes because the jury would need to make a decision on the gang enhancement only if it found the defendants guilty of either attempted murder or assault with a firearm. Both of those offenses are predicate offenses for the gang enhancement (see § 186.22, subd. (e)(1)–(3)) and could be used as one of the two offenses to establish a pattern of gang activity. (See *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401.) In that case, the jury would need to find only one additional predicate offense, as accurately reflected in the modified jury instructions. The instructions clearly indicated that the current offense was not sufficient on its own to establish a pattern of gang activity. They required the jury to find that "[t]he most recent crime occurred within three years of one of the earlier crimes," and that "[t]he crimes were committed on separate occasions or were personally committed by two or more persons."

Nor was Villareal prejudiced by the instruction stating that unlawful possession of a handgun could serve as a predicate offense. Villareal is correct that only certain forms of unlawful possession of a firearm are included within the statutory definition. (See § 186.22, subd. (e)(23) & (31)–(33).) But in this case, the only allegation involving unlawful possession of a firearm was a conviction by a member of the Loco Park gang of carrying a concealed firearm, in violation of section 25400. That is a predicate offense for a pattern of criminal gang activity. (See

§ 186.22, subd. (e)(32).) Thus, there is no possibility that the jury relied on a non-predicate offense involving unlawful possession of a firearm in finding the gang enhancement true.

F. *Instruction Allowing for Conviction on an Incorrect Theory*

Villareal contends that in two instances, the trial court gave the jury instructions that would have allowed the jury to convict him on the basis of a legally incorrect theory. He argues that this requires reversal under the rule of *People v. Guiton* (1993) 4 Cal.4th 1116, 1122 (*Guiton*). " '[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.' " We do not agree that the trial court erred in either instance.

1. *Natural and probable consequences instruction*

The first alleged error occurred in the instructions regarding the application of the natural and probable consequences doctrine. The court instructed the jury as follows:

"To prove that [the defendant] is guilty of attempted murder or assault with a firearm, the People must prove that:

"1. The defendant is guilty of attempted auto burglary;

"2. During the commission of attempted auto burglary a coparticipant in that attempted auto burglary committed the crime of attempted murder or assault with a firearm;

"AND

"3. Under all of the circumstances, a reasonable

person in the defendant's position would have known that the commission of the attempted murder or assault with a firearm was a natural and probable consequence of the commission of the attempted auto burglary."

Villareal contends that this instruction was legally incorrect because it failed to distinguish between attempted murder and assault with a firearm. Because the instruction repeatedly referred to "attempted murder or assault with a firearm" within the same instruction and with no clear separation, Villareal argues that the jury might have mixed and matched the two crimes, and might have concluded that he was guilty of *attempted murder* because a reasonable person in the defendant's position would have known that *assault with a firearm* was a natural and probable consequence of the attempted burglary.

We are not persuaded. Villareal's proposed reading is a tortured and unnatural interpretation of the instruction. Any reasonable juror reading the instruction would understand that to prove attempted murder, it was necessary to show that attempted murder, not assault with a firearm, was a natural and probable consequence of the attempted burglary. Although it might have been preferable for the court to have included the word "respectively" in the instruction, or to have issued a separate instruction for each offense, the lack of such punctilious clarification does not render the instructions legally incorrect.

2. *The gang enhancement*

Villareal also alleges *Guiton* error in the instruction on the gang enhancement. The instruction in question stated that if the jurors found the defendant guilty, they would then have to "decide whether, for each crime, the People have proved the

additional allegation that the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang." Villareal was a member of a gang known as Loco Park, and Reyes was a member of an allied gang known as Burlington Locos. The prosecution presented evidence that Loco Park engaged in a pattern of criminal gang activity, but did not present any evidence regarding Burlington Locos's pattern of criminal conduct. Villareal contends that the instruction was deficient because it failed to specify for the benefit of which gang the crimes were committed.

This is not *Guiton* error because the instruction did not present the jury with a legally incorrect theory. (See *Guiton*, *supra*, 4 Cal.4th at p. 1122.) Villareal's complaint is that the instruction allowed for the possibility that the jury would conclude that the crimes were for the benefit of the Burlington Locos gang, when the prosecution failed to present enough evidence that Burlington Locos was in fact a criminal street gang. But "the jury is fully equipped to detect" defects in the facts supporting the prosecution's case. (*Id*. at p. 1129.) If the jury found the gang enhancement true, we infer that the jury concluded that the crime was in fact for the benefit of Loco Park, the only gang for which there was sufficient evidence in the record. We will not infer that the jury relied on a theory without evidentiary support unless "the record affirmatively demonstrates there was prejudice, that is, if it shows that the jury did in fact rely on the unsupported ground." (*Ibid*.) Villareal has pointed to no such evidence of prejudice in the record.

G. *Instruction on Attempted Voluntary Manslaughter as Lesser Included Offense*

Villareal contends that the trial court erred by failing to instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder. We disagree. There was insufficient evidence to support a conclusion that Reyes acted either in a heat of passion or imperfect self-defense, and thus no instruction on attempted voluntary manslaughter was required.

Attempted voluntary manslaughter is a lesser included offense of attempted murder. The only difference between the two offenses is that in the case of attempted voluntary manslaughter, the perpetrator acts without malice, attempting to kill either "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) or in " 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense." (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . '[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe[s] that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252–1253.) Nevertheless, although there is an objective component to the heat of passion requirement, "in California the law of provocation focuses on ' "emotion[al] reasonableness" '

(i.e., 'whether "the defendant's *emotional* outrage or *passion* was reasonable" '), not on ' "act reasonableness" ' (i.e., 'whether "a reasonable person in the defendant's shoes would have responded or *acted* as violently as the defendant did." ')" (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481–1482.)

The trial court has an obligation to instruct the jury "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This is true regardless of whether the defendant openly relied on a theory at trial. (*Id.* at p. 149.) "We review de novo a trial court's failure to instruct on a lesser included offense." (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.) In so doing, "we review the evidentiary support for an instruction 'in the light most favorable to the defendant' [citation] and should resolve doubts as to the sufficiency of the evidence to warrant instructions ' "in favor of the accused." ' " (*People v. Wright*, *supra*, 242 Cal.App.4th at p. 1483.)

The evidence Villareal cites in support of his claim that an instruction on attempted voluntary manslaughter was necessary is insufficient. He notes that Aguilar told police after the shooting that he had had problems with Reyes a few months earlier. He also notes that after Reyes pulled a gun on Aguilar, Aguilar said, "[I]f you're going to shoot, you better shoot." Finally, he notes that Aguilar is a large man, while he and Reyes are thin. Even if we consider this evidence in the light most favorable to Villareal, it is insufficient to raise a question as to whether Reyes acted in imperfect self-defense or in a heat of passion. Aguilar spoke only after Reyes pulled a gun on him, and there is nothing to suggest that he moved toward Reyes or

Villareal threateningly or said anything that would arouse the passion of an ordinary person.

H. *Prosecutor Error*

Villareal contends that the prosecutor committed misconduct during closing arguments by misstating the law and facts, appealing to the jurors' sympathy and passions, and improperly vouching. With respect to all but one of these claims, Villareal forfeited the claim by failing to object at trial. (*People v. Potts* (2019) 6 Cal.5th 1012, 1035 [" 'A claim of prosecutorial misconduct is ordinarily preserved for appeal only if the defendant made "a timely and specific objection at trial" and requested an admonition.' "].) In addition, Villareal's arguments fail on the merits.

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) "The standards governing review of [prosecutorial] misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, . . . ; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . . .) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 . . . .) 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' (*Ibid.*)

When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To establish a claim of misconduct, "bad faith on the prosecutor's part is not required. (*Hill*, [*supra*, 17 Cal.4th] at pp. 822–823 . . . .) '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

Villareal claims that the prosecutor told the jury during closing arguments that it could find the gang enhancements true if it concluded that Reyes and Villareal committed their crimes for the benefit of either Reyes's Burlington Locos gang or Villareal's Loco Park gang, or both. Villareal contends that this was improper because there was insufficient evidence to show that Burlington Locos was a criminal street gang as defined in section 186.22, subdivision (f). In making this argument, Villareal has misrepresented the record. At no point in the initial closing argument or in the final summation did the prosecutor mention either Burlington Locos or Loco Park by name, nor did he encourage the jury to conclude that the crimes benefited one or the other. Instead, the prosecutor referred generically to "the gang." Although it might have been preferable for the prosecutor to distinguish carefully between the two gangs, the reference to a single gang was understandable and did not misrepresent this case. The prosecution's gang expert testified that Burlington Locos and Loco Park were allies, that their members sometimes

worked together to commit crimes, and that crimes of the type that Reyes and Villareal were accused of committing would have benefitted both of their gangs. The prosecutor's lack of precision does not call into question the jury's verdict on the gang enhancement.

Villareal contends that the prosecutor also committed misconduct by referring to facts not in evidence in arguing that Aguilar recanted his prior testimony because he had been intimidated by gang members. The prosecutor based this argument on evidence of a recorded jailhouse phone call in which Villareal solicited a friend to intimidate Aguilar, and the friend agreed to do so. The prosecutor reasonably argued that the jury should draw the inference that intimidation by gang members was the cause of Aguilar's otherwise unexplained recantation and inability to remember much of his prior testimony. " 'Although it is misconduct to misstate facts, the prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn" ' " from it. (*People v. Powell* (2018) 6 Cal.5th 136, 183.) Villareal should not now profit from his own misconduct.

Next, Villareal contends that the prosecutor erred by vouching for the evidence. "It is improper for a prosecutor to offer assurances that a witness is credible or to suggest that evidence available to the government but not before the jury corroborates the testimony of a witness. [Citations.] In either case, prosecutorial comments may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence." (*People v. Cook* (2006) 39 Cal.4th 566, 593.) During closing arguments, the prosecutor said, "I'm going to tell you something right now

that I hope my bosses don't hear because I'm probably in trouble. If you don't think that this was a natural and probable consequence, you must vote not guilty for Mr. Villareal. But I'm not afraid to tell you that." "I'm not afraid to tell you that, that if you don't think this was a natural and probable consequence . . . absolutely you got to dismiss this case against Mr. Villareal, but I'm not worried about telling you that because given all the evidence, I know that you see that it was a natural and probable consequence." Although these statements were awkwardly phrased, they did not constitute vouching. The prosecutor did not encourage the jury to substitute his or his bosses' judgment in place of their own, but rather encouraged the jury to apply the correct standard to decide whether the shooting was a natural and probable consequence of the attempted burglary. The statement "I know that you see that it was a natural and probable consequence" was a rhetorical flourish, not an attempt to short circuit the jury's deliberations.

Finally, Villareal argues that the prosecutor erred by encouraging the jury to view the crime through the eyes of a victim. In arguing that the attempted murder was for the benefit of a gang, the prosecutor stated as follows: "So how does doing something like this benefit the gang? It just shows the entire neighborhood I'll stand in the middle of the street and shoot you. I don't care. . . . What makes a gang a gang is that they're kind of scary. There's a reason they're scary. They rely on you being scared and intimidated . . . . *That's how it benefits the gang*. . . . [¶] And don't take my word for it. You can listen to the phone calls." (Italics added.) The prosecutor noted that during the crimes, Reyes stood "in the middle of the street" and fired his gun, without caring whether anyone saw him. The

prosecutor added, "What are you going to do about it? Are you going to walk up to him and tell him 'Tommy, stop?' That's not going to happen in the community because you're scared."

In making these statements, the prosecutor was not encouraging the jury to view the crime through the eyes of a victim, but rather using the word "you" in the impersonal sense, to mean "one" or "anyone." There was nothing improper about this manner of speaking.

I. *Ineffective Assistance of Counsel*

Villareal contends that his trial counsel failed to represent him adequately in several respects: by failing to request a limiting instruction on the admissibility of jailhouse phone conversations that Reyes made; by failing to question Aguilar at trial about how Villareal reacted when Reyes shot Aguilar; and by failing to object to the alleged errors in jury instructions described in part F above, and to the alleged prosecutor error described in part H above. We have already rejected that there was prejudicial error with regard to the jury instructions and prosecutor's conduct, and we conclude without further discussion that there was no ineffective assistance of counsel for failing to object on these points. As to the failure to request a limiting instruction or to question the victim about Villareal's reaction, these alleged deficiencies either did not fall below the standard of care, or if they arguably did, they did not prejudice Villareal.

In order to establish ineffective assistance of counsel, a defendant must show first, that his attorney's performance was deficient, and second, that those errors prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) We "judge the reasonableness of counsel's challenged conduct on

the facts of the particular case, viewed as of the time of counsel's conduct." (*Id.* at p. 690.) In applying this standard, we " ' "defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

1. *Objection to admission of Reyes's jailhouse phone calls*

Villareal contends that his trial counsel was deficient for failing to request a limiting instruction on the admissibility of recorded jailhouse phone conversations involving his codefendant Reyes, to which Villareal was not a party. In one of these conversations, Reyes bragged about being a "gang banger." In another call, he bragged that everyone in his neighborhood was afraid of him. In other calls, he told his girlfriend he was glad that they had burned his black jacket, and asked whether

she had burned a mask. Villareal argues that although these statements may have been admissible against Reyes, they were inadmissible hearsay as applied to Villareal. He contends that his attorney should have requested a limiting instruction pursuant to CALCRIM No. 305.[7]

Villareal's claim fails because he cannot show that the lack of a limiting instruction prejudiced him. Reyes's statements that he burned the mask and jacket were incriminating as to Reyes himself, but had no bearing on Villareal's defense. Reyes stipulated that he was a member of the Burlington Locos gang, and his statements in the jailhouse phone calls regarding his gang activities were largely cumulative. Reyes's statements bragging that everyone in his neighborhood was afraid of him were relatively unimportant in the trial. If the jury had received an instruction that these statements were not admissible against Villareal, there is no reasonable probability that Villareal would have obtained a better outcome in the trial. (See *Strickland*, *supra*, 466 U.S. at p. 694.)

2. *Failure to question the victim on Villareal's reaction to the shooting*

At the preliminary hearing, Aguilar testified that when Reyes shot him, Villareal appeared "surprised," and that "[h]e got stuck. He froze." During cross-examination of Aguilar at trial, Villareal's attorney did not ask Aguilar about this. We

---

[7] The pattern jury instruction CALCRIM No. 305 states, "You have heard evidence that defendant <*insert defendant's name*> made a statement (out of court/before trial). You may consider that evidence only against (him/her), not against any other defendant."

reject Villareal's contention that this amounted to ineffective assistance of counsel because there is no reasonable probability that Villareal would have obtained a better result at trial if his attorney had asked about the errors. (See *Strickland*, *supra*, 466 U.S. at p. 694.) Villareal's surprise at the shooting may show that he did not expect Reyes to shoot Aguilar, but this is irrelevant to whether the shooting was a natural and probable consequence of the attempted burglary.

J. *Cumulative Error*

Villareal contends that even if no single error requires reversal, the cumulative effect of the errors was sufficient to prejudice him. We disagree. The only prejudicial error in this case was the trial court's decision to allow the case to proceed despite two prior dismissals. To the extent the trial court erred in other respects, the errors were not prejudicial either alone or in combination.

DISPOSITION

Appellant's conviction of assault with a firearm is reversed. The case is remanded for the trial court to determine whether one of the two prior dismissals of the case was due solely to excusable neglect. If the prosecution cannot establish that one of the two prior dismissals was due solely to excusable neglect, then appellant's conviction of attempted murder is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.